

Chuck

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION FOR)	
BENEFICIAL WATER USE PERMIT 41F-108990)	FINAL
BY EMMETT M. AND PATRICIA J. MAYNE)	ORDER

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the August 17, 2001, Proposal for Decision, and incorporates them herein by reference.

It has come to the Department's attention that Condition D in the Proposal did not specify when the flows in the source must be measured. Finding of Fact Six of the Proposal states no adverse affect will occur if Applicant stops diverting when the flow in the source drops below 20 gallons per minute. Measuring flows at times there is no diversion occurring would serve no purpose. Condition D is modified to require measurement only when water is diverted into the pond.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 41F-108990 is **ISSUED** to Emmett M. and Patricia J. Mayne to appropriate 11.6 gallons per minute up to 0.09 acre-feet of water per year from an unnamed tributary of

Final Order
Application 41F-108990 by Emmett M. and Patricia J. Mayne

Page 1

CASE # 108990

Horn Creek at a point in Lot 79 of the Wagon Tract subdivision, in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 35, Township 12 South, Range 02 East, Madison County, Montana. The means of diversion is a pipeline. The period of use is May 1 to September 1, inclusive, of each year. The purpose is .017 acre-feet for stock use and .073 acre-feet for fire protection. The place of use is in Lot 79 of the Wagon Tract subdivision, in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 35, Township 12 South, Range 02 East, Madison County, Montana. The place of off stream storage is a 0.09 acre-foot reservoir in Lot 79 of the Wagon Tract subdivision, in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 35, Township 12 South, Range 02 East, Madison County, Montana.

- A. Only water in excess of 20 gpm may be appropriated from the unnamed tributary of Horn Creek.
- B. The pond can be filled only during high spring flows which occur within the period of use.
- C. The pond must be lined with *Firestone EDPM* 45 mil liner, or the equivalent to eliminate seepage from the reservoir. The liner must be installed and maintained according to manufacturer specifications.
- D. Permittee must install and maintain a measuring device that measures water flowing below the point of diversion in the source. The appropriator may seek Department assistance with how best to obtain the necessary measurements. Water must not be diverted until the required measuring device is in place and operating. On a form provided by the Department, the appropriator shall keep a written weekly record of the flow rate of all waters flowing below the point of diversion in the source, including the period of time, during the period water is diverted. Records shall be submitted by November 30th of each year and upon request at other times during the year. Failure to submit reports may be cause for revocation of a permit or change.

The records must be sent to the Water Resources Regional Office. The

Final Order

Application 41F-108990 by Emmett M. and Patricia J. Mayne

Page 2

CASE # 108990

appropriator shall maintain the measuring device so it always operates properly and measures flow rate accurately.

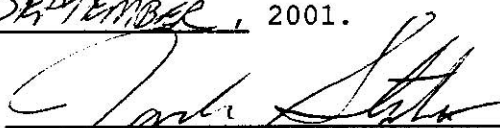
E. Fire department access to the pond must be in accordance with local fire department regulations.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of this Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the proceedings to the district court.

Dated this 21ST day of SEPTEMBER, 2001.



Jack Stults, Administrator
Water Resources Division
Department of Natural
Resources and Conservation
PO Box 201601
Helena, MT 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the Final Order was served upon all parties listed below on this 24th day of September, 2001.

EMMETT M & PATRICIA J MAYNE
291 FLOWER ST UNIT B
COSTA MESA CA 92627

ROBERT E & JANICE SNOWDEN
2058 HWY 87 N
CAMERON MT 59720

SCOTT COMPTON, MANAGER
JAN MACK, WRS
BOZEMAN REGIONAL OFFICE
151 EVERGREEN DRIVE, SUITE C
BOZEMAN MT 59715

CURT MARTIN, CHIEF
WATER RIGHTS BUREAU
PO BOX 201601
HELENA MT 59620-1601



Jennifer L. Hensley
Hearings Unit
406-444-6615

Chuck

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION FOR)
BENEFICIAL WATER USE PERMIT 41F-108990)
BY EMMETT M. AND PATRICIA J. MAYNE)

PROPOSAL
FOR
DECISION

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. §85-2-307, a hearing was held on July 11, 2001, in Bozeman, Montana, to determine whether a beneficial water use permit should be issued to the Applicant for the above application under the criteria set forth in Mont. Code Ann. §85-2-311.

APPEARANCES

Applicants appeared at the hearing in person. Mike Mayne and Patricia Mayne testified for the Applicant.

Objector Robert Snowden appeared at the hearing in person. Harry Liss, Jerry Bausch, and Ron Shaw appeared as witnesses for Objector Snowden.

Jan Mack, Water Resources Specialist with the Bozeman Water Resources Regional Office of the Department of Natural Resources and Conservation (Department) was called to testify by the Objector. Scott Compton, Regional Manager, Bozeman Water Resources Regional Office of the Department was called to testify by the Hearing Examiner.

EXHIBITS

Both Applicant and Objectors offered exhibits for the record.

Applicant offered thirteen exhibits for the record. The Hearing Examiner accepted Applicant's Exhibits 1-13.

Applicant's Exhibit A1 is one page copy of Applicant notes of a personal conversation with the Belgrade Fire Department.

CASE # 108990

Applicant's Exhibit A2 consists of copies labeled 1-8 on five pages of photograph copies showing the area near the Mayne pond.

Applicant's Exhibit A3 is a one page sketch including the source and place of use.

Applicant's Exhibit A4 is a two page copy of a letter and envelope to Applicant from Johnny Campbell.

Applicant's Exhibit A5 is a one page map showing Wagontrack Ranch lot numbers and acreages.

Applicant's Exhibit A6 is three pages including Applicant's flow measurement records. The last paragraph (June 20 entry) is not relevant and is excluded.

Applicant's Exhibit A7 is a one page copy of Mr. Compton's 7/1/98 field investigation notes.

Applicant's Exhibit A8 is a two page copy of pond liner information (Pondguard EPDM).

Applicant's Exhibit A9 is a one page copy of Applicant's telephone conversation with Conrad Camody regarding pond liners.

Applicant's Exhibit A10 consists of eight pages regarding revoked water right 41F-P036921 issued to George R. Wolstad.

Applicant's Exhibit A11 is a one page Department abstract of Shaw's V-K Ranch, L.L.C. water right 41F-W133995-00.

Applicant's Exhibit A12 is a one page copy of Applicant's telephone conversation notes with Charlynn regarding pond liners.

Applicant's Exhibit A13 is a two page copy of Bob Snowden correspondence (and envelope).

Objector offered two exhibits for the record. The Hearing Examiner accepted Objector's Exhibit 01.

Objector's Exhibit 01 is five photographs of the source and pond area.

Objector's Exhibit 02 is two photos of weeds growing in the pond bottom.

PRELIMINARY MATTERS

At a prehearing conference the Parties stipulated that possessory interest in the place of use was not at issue.

The public notice for this application listed stock as the only purpose. The application listed fire protection is an intended use, but listed no rate or volume for the purpose. At the hearing Applicant made it clear that a portion of the pond volume indicated on the application and public notice is to provide stored water for structure fire suppression. The clarified use is not for additional water above that noticed; it better describes the intended use. The Hearing Examiner finds that existing water users and parties are not prejudiced by the clarification of purpose, and re-notice is not required.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

1. Application for Beneficial Water Use Permit 41F-108990 in the name of and signed by Emmett M. and Patricia J. Mayne was filed with the Department on October 12, 1999, and made correct and complete on October 3, 2000. (Department file)
2. The Environmental Assessment (EA) prepared by the Department for this application was reviewed and is included in the record of this proceeding.

3. Applicant seeks to appropriate 11.6 gallons per minute (gpm) up to 6.35 acre-feet of water per year from an unnamed tributary of Horn Creek at a point in Lot 79 of the Wagon Tract subdivision, in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 35, Township 12 South, Range 02 East, Madison County, Montana. The proposed means of diversion is a pipeline. The proposed period of appropriation and period of use is May 1 to September 1, inclusive, of each year. The proposed purpose is for stock use and fire protection. The proposed place of use is in Lot 79 of the Wagon Tract subdivision, in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 35, Township 12 South, Range 02 East, Madison County, Montana. The proposed place of off stream storage is a 0.1 acre-foot reservoir in Lot 79 of the Wagon Tract subdivision, in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 35, Township 12 South, Range 02 East, Madison County, Montana.

(Department file, Preliminary Matters [above], Applicant testimony)

4. Applicant has proven water is physically available. Applicant measured instantaneous flows in the source at the proposed point of diversion using a wooden weir, bucket, and stopwatch. Applicant measured 31.6 gpm in June 1999, 33 gpm in July 1998, and 33 gpm in August 2000 flowing in the Unnamed Tributary of Horn Creek at the point of diversion. Objector and Mr. Harry Liss measured flows in the source near the proposed point of diversion using a pipe, bucket, and stopwatch. Objector measured eight gpm May 6, 2001, and 2-3 gpm June 17, 2001. The low 2001 flows are caused by the current drought cycle. Objector suggested the application be resubmitted when the drought is over. Applicant has shown the flows exist when there is no drought, so reapplication is not necessary. (Department file, testimony of Mike and Patricia Mayne, Robert Snowden, Harry Liss,)

5. Applicant has proven water is legally available. There are existing rights to flows from this source of 20 gpm by Objector

8 Snowden and a right for historic stock use by the owner of the Shaw Ditch into which this Unnamed Tributary of Horn Creek enters on Applicant's property. Applicant requested only flows in excess of Objector Snowden's existing right. The owner of the Shaw Ditch uses the Shaw Ditch to collect and convey stock water from Mile Creek and other smaller tributary sources to the Shaw Ditch to reservoirs for stock use. Witness Shaw has no concerns if there is adequate stock water for their needs. Applicant can stop appropriating water by removing or plugging the diversion pipe if water becomes unavailable for their use. (Department file, testimony of Applicant, Objector, Ron Shaw)

0 6. Applicant has proven there would be no adverse effect to the water rights of prior appropriators under an existing water right, certificate, permit, or state water reservation when 20 gpm is allowed to remain in the source below the point of diversion. Applicant agreed to measure the flow in the source and stop diverting at times the flow drops below 20 gpm, the flow rate of the downstream right.

(Department file, testimony of Mike Mayne)

8 7. Applicant has proven the proposed means of diversion, construction, and operation of the appropriation works are adequate when the pond is lined to prevent seepage, and proper withdrawal works are provided for the rural fire department. Currently the pond volume can seep from the pond in 3.5 days. Initially bentonite was placed in the pond bottom, but no sealant maintenance has occurred since that time. Bentonite does not work as a good sealant in all reservoirs, and requires routine maintenance to remain effective. Liners with equivalent specifications to Firestone EPDM 45 mil rubber liners are adequate to prevent excess seepage when installed and maintained according to manufacturer's specifications. Applicant sought local

fire department water storage access rules and specifications (e.g., pipe sizes), and found they vary between departments. (Department file, testimony of Patricia Mayne, Robert Snowden, Harry Liss)

8. The proposal is in both Madison River basin and Upper Missouri basin closure areas. Mont. Code Ann. §§ 85-2-341, 343. New permits in these closure areas may be issued for non consumptive uses, stock uses, and storage during high spring flows. Although appropriations for temporary emergencies such as fires are allowed in the basin closure area, storage of water for future fires does not fit in the emergency category. Mont. Admin. R. 36.12.101(6) and 36.12.105. Therefore, the water for this fire protection purpose must be stored during high spring flow.

By Applicant's testimony most of the water requested by this application is for the fire protection purpose. Since fire protection is not exempt from the Madison River and Upper Missouri River Closures, evaporation (.143 acre-feet from May to September) and seepage from the pond must be made up from a source exempt from the closure, such as a well or other groundwater. (Department file, testimony of Mike and Patricia Mayne, Jan Mack)

9. Applicant has proven the proposed use of water for stock and fire protection is beneficial for the volume of the current pond. There are times when other area water sources are not adequate for fire protection. The pond dimensions of 41' by 52' by 3.5' (42") result in a pond volume of 0.09 acre-feet¹. Two horses require 0.017 acre-feet² for the portion of the year requested. The balance in excess of the stock use is .073 acre-feet, or 23787 gallons. Twenty to thirty thousand gallons of water is reasonable to put out a barn and house

1 .09 acre-feet=((41'*52'*3.5')*.5[shape factor])/43560 ft³/af)

2 .017 acre-feet=([0.017 AF/AUY]*[.34 year]*3 AU)

structure fire. Thus, the entire volume of the pond is beneficial when the combined stock and fire protection purposes are considered. Evaporative losses estimated at 0.143 acre-feet are not included in the calculated pond volume of 0.09 acre-feet. Storage for fire suppression is not exempt from the closures and comprises the bulk of the intended appropriation. Therefore, evaporative losses must be made up from other sources exempt from the Madison River and Upper Missouri River Closures.

The continuous flow of 11.6 gpm to keep the stock water fresh after the pond is filled was not shown to be either necessary, or adequate for the purposes. Although an 11.6 gpm flow rate for keeping the stock water fresh does not appear excessive, lessor amounts may be adequate. A permit can only be issued for the amount of water necessary to sustain the purpose. The record does not quantify how much flow or how many pond turnovers are required to keep the water fresh for the stock after the pond is filled. The Applicant was indirectly informed of the requirement to quantify the rate and volumes for the purposes in the application in September 12, 2000 correspondence. The flow rate and volume for flow through purposes has not been shown to be beneficial. (Department file, testimony of Mike Mayne, Patricia Mayne, Robert Snowden, Jan Mack)

10. Applicant has proven they have possessory interest in the property where the water is to be put to beneficial use. (Department file)

11. No timely objections relative to water quality were filed against this application nor were there any objections relative to the ability of a discharge permit holder to satisfy effluent limitations of his permit. However, Objector Snowden stated at hearing that in the off season the pond may collect weed seeds, moss, and stagnant water which

would flow into the Shaw Ditch when the pond is activated each spring, and thus should have a drain to prevent stagnant water from entering the Shaw Ditch. Although not an issue properly before the Hearing Examiner, it appears the Shaw Ditch will be running water (~150 gpm) prior to the time this pond is in use which may be sufficient to dilute any stagnant water that may reach the ditch. (Department file, testimony of Robert Snowden)

Based on the foregoing Findings of Fact and the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department has jurisdiction to issue a provisional permit for the beneficial use of water if the applicant proves the criteria in Mont. Code Ann. §85-2-311.
2. The Department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria for issuance of a beneficial water use permit. Mont. Code Ann. §85-2-312.
3. Applicant has met, or there are conditions which can satisfy, the criteria for issuance of a beneficial water use permit. See Findings of Fact 3 through 11. Mont. Code Ann. §85-2-311.

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 41F-108990 is **ISSUED** to Emmett M. and Patricia J. Mayne to appropriate 11.6 gallons per minute up to 0.09 acre-feet of water per year from an unnamed tributary of Horn Creek at a point in Lot 79 of the Wagon Tract subdivision, in the NW¼SW¼ of Section 35, Township 12 South, Range 02 East, Madison

Proposal for Decision

Application 41F-108990 by Emmett M. and Patricia J. Mayne

Page 8

CASE # 108996

County, Montana. The means of diversion is a pipeline. The period of use is May 1 to September 1, inclusive, of each year. The purpose is .017 acre-feet for stock use and .073 acre-feet for fire protection. The place of use is in Lot 79 of the Wagon Tract subdivision, in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 35, Township 12 South, Range 02 East, Madison County, Montana. The place of off stream storage is a 0.09 acre-foot reservoir in Lot 79 of the Wagon Tract subdivision, in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 35, Township 12 South, Range 02 East, Madison County, Montana.

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measuring device so it always operates properly and measures flow rate accurately.

E. Fire department access to the pond must be in accordance with local fire department regulations.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 16th day of August, 2001.



Charles F Brasen
Hearing Officer
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 201601
Helena, Montana 59620-1601

CERTIFICATE OF SERVICE

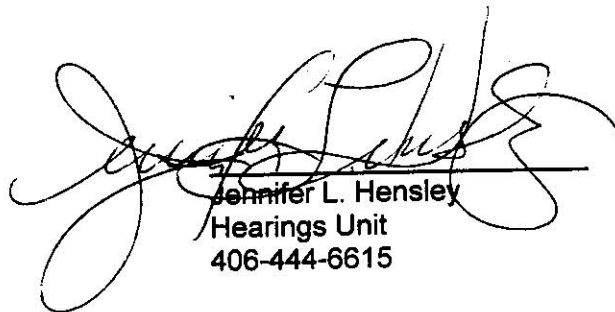
This certifies that a true and correct copy of the Proposal for Decision was served upon all parties listed below on this 17th day of August, 2001.

EMMETT M & PATRICIA J MAYNE
291 FLOWER ST UNIT B
COSTA MESA CA 92627

ROBERT E & JANICE SNOWDEN
2058 HWY 87 N
CAMERON MT 59720

SCOTT COMPTON, MANAGER
JAN MACK, WRS
BOZEMAN REGIONAL OFFICE
151 EVERGREEN DRIVE, SUITE C
BOZEMAN MT 59715

CURT MARTIN, CHIEF
WATER RIGHTS BUREAU
PO BOX 201601
HELENA MT 59620-1601


Jennifer L. Hensley
Hearings Unit
406-444-6615